

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JONATHAN JOVAIL CARGLE,

Defendant-Appellant.

UNPUBLISHED

March 17, 2015

No. 320389

Oakland Circuit Court

LC No. 2013-245478-FC

Before: DONOFRIO, P.J., and RIORDAN and GADOLA, JJ.

PER CURIAM.

A jury convicted defendant of armed robbery, MCL 750.529, being a felon in possession of a firearm (felon-in-possession), MCL 750.224f, carrying a concealed weapon (CCW), MCL 750.227, conspiring to commit inducements or promises to witnesses, MCL 750.157a; MCL 750.122(3), and two counts of possessing a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant as a third habitual offender, MCL 769.11, to prison terms of 14 to 40 years for the armed robbery conviction, 3 to 10 years for the felon-in-possession and CCW convictions, and 6 to 30 years for the conspiracy conviction, to be served concurrently to one another, but consecutive to concurrent two-year terms of imprisonment for the felony-firearm convictions. Defendant appeals as of right. We affirm.

Defendant's convictions arise from an armed robbery that occurred during an attempted marijuana transaction at a gas station in Pontiac, Michigan. Before his preliminary examination, defendant made a phone call from jail in which he asked a friend to bribe several witnesses to prevent them from testifying against him. At the preliminary examination, three witnesses, Diandre Johnson, Tiffany Jones, and Breon Jackson, all testified against defendant. However, all three witnesses failed to appear at defendant's originally scheduled trial date. An investigator testified that Johnson told him the morning of trial that he was not coming because he was afraid. Johnson informed the investigator that Jackson was "jumped" by some of "defendant's people"

over the weekend.¹ The court adjourned defendant's trial to give the prosecutor more time to secure the witnesses.

At defendant's rescheduled trial, all three witnesses appeared and testified. Johnson and Jones both testified that they were afraid because they heard from a third party that they would be shot if they testified. Detective MacDonald testified that Jackson told him he did not want to testify and that he was concerned for his safety because of interactions he had with defendant when they were in jail together during the two weeks before trial.² However, at trial, Jackson denied talking to defendant while in jail, and denied remembering what he and MacDonald spoke about. Although Jackson easily identified defendant at the preliminary examination, at trial, Jackson stated that defendant only "sort of" or "kind of" looked like the individual involved in the gas station incident. A jury convicted defendant of all counts charged.

Defendant first argues that the prosecutor engaged in misconduct by eliciting unfairly prejudicial evidence of threats against the witnesses without connecting those threats to him. Because defendant did not object to the prosecutor's conduct at trial, this issue is unpreserved. *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010). We review unpreserved claims of prosecutorial misconduct for plain error affecting substantial rights. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). "Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Id.*

When reviewing issues of prosecutorial misconduct, we examine the issues on a case-by-case basis and evaluate the prosecutor's actions in context. *People v Mann*, 288 Mich App 114, 119; 792 NW2d 53 (2010). The propriety of a prosecutor's conduct depends on the specific facts of each case. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). Claims of prosecutorial misconduct may not be predicated on a prosecutor's good-faith efforts to admit evidence. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999).

¹ Oakland County Sheriff's Detective John MacDonald testified that defendant admitted during an interview that he was a member of the Goon Squad, a criminal organization in the Pontiac area.

² MacDonald testified that the week before trial, Jackson gave him a note that Jackson said he received from defendant while in jail. The note stated the following:

Nigger, say that you don't know what happened, all you know is you all come to buy some weed and, and you and your girl was in the store and if they ask you if you see the guy in the court, say, no, that's not him—and their shit will all go away. But just say you didn't see nothing . . . [you] was in the store so you really . . . don't know who it was—I believe is what it is—I'm really only here cause you all made me come.

At trial, a handwriting expert confirmed that defendant wrote the note.

Generally, evidence of threats against a witness must be linked to the defendant if the evidence is offered to show the defendant's consciousness of guilt. *People v Sholl*, 453 Mich 730, 740; 556 NW2d 851 (1996). However, evidence that a witness was threatened by someone other than the defendant is also admissible for its relevance to the witness's credibility. *People v Johnson*, 174 Mich App 108, 112; 435 NW2d 465 (1989). Such evidence is relevant to demonstrate a witness's bias or reluctance to testify, or to explain prior inconsistent statements of the witness. *Id.*; *People v Clark*, 124 Mich App 410, 412-413; 335 NW2d 53 (1983).

In this case, the prosecutor had a good-faith basis for believing that evidence of threats against Johnson and Jones was admissible to explain their reluctance to testify at trial. The prosecutor was aware that both witnesses failed to appear on the original trial date, and that Johnson informed an investigator that he did not appear because he was afraid. At trial, Johnson and Jones both admitted that they were not threatened directly, but both claimed that a third party told them they would be harmed if they testified. Johnson admitted that he was concerned for his safety and did not feel comfortable testifying. Jones similarly stated that she was uncomfortable being in court and was concerned for her safety.

The prosecutor also reasonably believed that evidence of threats against Jackson was admissible to explain Jackson's inconsistent statements. Although Jackson unequivocally identified defendant at the preliminary examination, he only hesitantly identified defendant at trial. Jackson also denied speaking with MacDonald about his fear of testifying, despite MacDonald's testimony otherwise. Evidence that the witnesses were afraid to testify was relevant to their credibility and to explain inconsistencies between the trial and preliminary examination testimony. Further, because Jackson, Johnson, and Jones were key witnesses in the case, the significant probative value of the evidence relating to their credibility outweighed the danger of unfair prejudice the evidence may have posed to defendant. Accordingly, defendant cannot demonstrate that the prosecutor's conduct resulted in plain error.

Defendant also argues that the prosecutor improperly remarked during his closing argument that Jackson told MacDonald that he had been threatened. The challenged remark occurred during the following portion of the prosecutor's closing argument:

Also, look at the actions of the defendant after the crime. . . . Here the defendant is on the telephone asking people to try and stop the witnesses from coming to the preliminary hearing thinking the case would be dismissed. If the witnesses don't show, there's no case and he thinks he's going to walk out. That shows his guilty state of mind. Only a guilty person would do something like that—to tell people to pay people off. . . .

But then also look at just recently within the last couple of weeks. This is what the defendant is writing and saying. This is the defendant's note to Breon—say that you don't know what happened, say you all came to buy some weed and your girl was in the store, if they ask you if you see the guy in court, say no thanks, not him, and this will all go away, or just say you didn't see nothing, you was in the store, you really can't point out who it was. I'm really here [because] you all . . . made me come.

This is the same thing that Detective MacDonald told you Breon told him within the last two weeks, that Breon reached out to Detective MacDonald to say—hey, I’ve been told not to come to court, I’ve been told to lie, *I’ve been threatened*. And the note corroborates exactly what Breon verbally said to Detective MacDonald. [Emphasis added.]

Defendant argues that the emphasized remark was improper because MacDonald testified at trial that Jackson told him that he was “concerned for his safety,” not that he had been threatened.

Although a prosecutor may not make a statement of fact to the jury that is unsupported by the evidence, he is free to argue the evidence and all reasonable inferences arising from it as they relate to his theory of the case. *People v Unger*, 278 Mich App 210, 236; 749 NW2d 272 (2008). MacDonald testified that Jackson told him that he spoke to defendant while they were both in jail and that, as a result of that interaction, Jackson was concerned for his safety and did not want to testify. The prosecutor could reasonably infer from this evidence that Jackson felt threatened. Thus, there was no plain error. Moreover, the trial court provided the jury with a cautionary instruction that stated, “[T]he lawyers’ statements and arguments and any commentary are not evidence.”³ The trial court’s instruction was sufficient to protect defendant’s substantial rights. Accordingly, reversal is not warranted.

Affirmed.

/s/ Pat M. Donofrio
/s/ Michael J. Riordan
/s/ Michael F. Gadola

³ We presume that jurors follow any instructions provided by the trial court. *People v Katt*, 248 Mich App 282, 311; 639 NW2d 815 (2001).